

# School Attendance Legal Action Guidelines

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## **Introduction**

In situations where all attempts at resolving poor school attendance have failed to rectify the problem, consideration should be given to legal recourse by way of either prosecution in the Local Court or by seeking legal redress through new legal processes in the Children's Court.

The essential difference between the two legal approaches is that orders issued through the Children's Court do not involve the potential imposition of a monetary penalty whereas the traditional prosecution in the local Court involve the possible imposition of a fine of up to \$2,500 and/or a community service order.

The aim of the Children's Court actions on the other hand is to assist the family and/or child address those issues which are preventing satisfactory school attendance. This will be achieved by the Court issuing Compulsory Schooling Orders. These Orders, both interim and final, can take a variety of forms aimed at addressing the underlying issues affecting the school attendance.

## **The nature of Children's Court legal actions for poor school attendance**

Legal actions in the Children's Court will be by way of an application whereby a resolution of the poor school attendance is sought. The means by which this will be achieved is through the issuing of a "**Compulsory Schooling Order**" (CSO) under section 22D of the Act. Compulsory Schooling Orders (CSO) can either be interim or final.

An application to the Court, at the initial stage, will be aimed at reinforcing the legal obligation that parents have to ensure their child's education, whilst, at the same time, seeking to address and resolve those issues which are adversely affecting their child's education. With this in mind it is anticipated that the applications will operate in a manner similar to Magistrates Early Referral Into Treatment and the Traffic Offenders Program, in that interim orders will be sought to operate within a time frame of several months, and the progress of the matter will be reviewed by the court at the subsequent mention(s).

## **The Fundamental Responsibility Contained in all Compulsory Schooling Orders**

All CSOs, whether Interim or Final, will require the parent **to meet their duty to cause the child to be enrolled at, and to attend school at all times that the school is open for the child's instruction** (the generic order).

## **Interim Compulsory Schooling Orders**

It is anticipated that all Interim Compulsory Schooling Orders will either reflect consent agreements reached between schools and the respondent parent, or alternatively require the parties to attend a conference with a view to reaching agreement which will then be evidenced by undertakings to be tabled at court (see Conferences below).

In cases where, for example, a school considers that the parent has resisted engagement on the issue of their child's poor attendance an order would be sought, in addition to the generic

order pertaining to the parent's duty to ensure the child's school attendance, that ***the respondent parent engage with relevant school staff in accordance with signed undertakings.***

In many cases issues will have been isolated through the parties attending conferences and the orders sought may simply reflect undertakings that have arisen from the conference, for example an order that ***in accordance with formal written undertakings provided by the respondent parent, they are to attend drug and alcohol counselling, and/or have a child medically assessed by a particular medical practitioner.***

In other cases the parties will neither have reached an agreement reflected in undertakings, nor participated in a conference, and in these cases an Interim Order will be sought requiring the parties to attend a conference.

It is anticipated that the nature of Interim orders sought from the Court will be quite straight forward in order to clarify and narrow the issues for the benefit of the defendant. To give an example, where a case simply involves parents failing to ensure their child maintains good sleeping patterns and they have failed to meet undertakings that were given in a conference relating to their management of the issue, it may be that the order sought is that ***the parent will turn off the child's computer game at a certain time each night, as contained in the signed undertaking etc.***

### **Final Compulsory Schooling Orders**

It is intended that Final Compulsory Schooling Orders will be more general in nature than Interim Orders, with the majority of applications simply seeking the generic order. Such applications will occur in a variety of scenarios, as outlined below.

It is hoped that the majority of cases will see the child return to a satisfactory level of school attendance and the matter will reach a conclusion by the issuing of a generic order, with the aim being to reinforce a parent's ongoing obligation regarding their child's education.

In some cases parents make the necessary effort to achieve an improvement in the child's school attendance while ever there is a legal action afoot, however the attendance falls way again once the legal action is discontinued. In these cases a **Final Compulsory Schooling Order** would also be sought as a means of reinforcing with a parent the need to maintain the actions which have achieved the necessary improvement in school attendance.

It may be that a decision is reached in a particular case that no progress is being made through the application to the Children's Court and the matter warrants prosecution in the local Court.

In these situations a **Final Compulsory Schooling Order** will generally be sought which will allow the Department to mount a prosecution in the Local Court for a breach of Compulsory Schooling Order, under section 22D(9) of the Act.

While DET is keen to utilise the powers under the new legislation in order to assist families bring about genuine resolution of the issues that are affecting their child's school attendance, it has nonetheless been the our experience that prosecutions in the Local Court, and the associated imposition of a fine, can often be the catalyst to bringing about an improvement in a child's attendance.

## **Evidence**

It is envisaged that applications will possibly be contested at two points in the overall court process. Firstly, at the initial stage where a respondent may deny that the child's attendance is poor, in which case a "show cause" situation arises.

Secondly, in situations where the Department is seeking a Final CSO and contends that a respondent has not complied with an Interim CSO, or that the child's attendance has not reached a satisfactory level, the Court will need to determine whether, in all the factual circumstances, the Department's application for the Final CSO is to be granted.

While it is envisaged that numerous factual aspects of an application will only be established by the introduction of oral evidence, the operation of Section 123 of the *Education Act* provides for a certificate from the school to be considered prima facie proof of the child's absences from school. Applications to the courts will rely on such certificates where the child's non-attendance at school is disputed, with the onus thereby falling on the respondent parent to rebut the material contained within the certificate.

## **Conferences**

A principle component of the new procedures will be the capacity to conduct a conference involving families and relevant welfare agencies and officers. The conferences will aim to address the underlying causes of poor school attendance.

In cases where parents have refused to attend a conference, or a conference is not required to either isolate or mediate the issues behind the poor school attendance, it is anticipated that matters will proceed to the Children's Court and the need or otherwise for a conference will be explored and determined on a case by case basis.

## **Undertakings**

Greater reliance will be placed on formal undertakings from parents regarding their conduct and approach to resolving their child's poor school attendance than has occurred in the past. The importance of undertakings is reflected by them being a specific component of the amendments, see Compulsory Schooling Undertaking, at section 22B of *the Act*. Section 22B(4) of the Act provides for such undertakings to be admissible in evidence in proceedings for poor school attendance.

Such undertakings will likely form an integral component of the conference process, with a primary aim of a conference being to commit the positions of the respondent parent, as well as other relevant parties, to formal undertakings. Section 22C (5) of the Act states that *the Children's Court may include in a compulsory schooling order any undertaking or obligation formulated by a conference.*

The Court may also *accept* undertakings when making a Compulsory Schooling Order under Section 22D (7)(a). Such undertakings can be accepted by the Court regardless of whether they are undertakings resulting from a Section 22C conference, or they are Compulsory Schooling Undertakings resulting from negotiations between Department officers and the parent.

## **Children In Court**

In cases involving older children, aged twelve and above, where it is clearly established that the poor school attendance is not the fault of the parent, an application involving the child alone may be commenced, under sections 22D (3) (a) and (b) of *the Act*. In these cases the Children's Court has the power to issue a fine up to 1 penalty unit (\$110) without proceeding to a conviction, section 22D(9)(b).

## **Prosecution and Penalties**

Finally, as indicated, prosecution in the Local Court remains a further option when dealing with poor school attendance. The penalties for a conviction have been doubled to a maximum of twenty five penalty units (two thousand five hundred dollars).

Also, an action for breach of a Compulsory Schooling Order issued in the Children's Court must undertaken in the Local Court, with penalties for these offences attracting a possible fine of 100 penalty units.

## **Accessing legal representation to initiate a school attendance legal action**

Legal representation for school attendance legal actions will generally be provided to non-government schools in situations of chronic poor attendance where all reasonable attempts at seeking a resolution have failed. Non-government schools can request that a legal action be commenced by contacting the Chief Legal officer at DET's Legal Services Directorate on 9561 8538.

## **Mentions**

During the initial stages of a legal action the first mention of a matter at court will generally involve the DET legal representative and representative from the school who has knowledge of the factual background of the matter.

## **Report Backs**

It is expected that in the vast majority of cases the Court will consider that a matter can be resolved without the need for a legal determination. In these cases the legal representative of the school will seek an adjournment to explore issues which may resolve the poor school attendance. To this end the applications to the Children's Court may include the issuing of Interim Compulsory Schooling Orders which will operate between mentions at court. The subsequent mentions or informal "report back" to the court will essentially deal with the outcomes of the interim order.

## **Show Cause Hearings**

In the event that the facts are disputed and a matter proceeds to a contested "Show Cause Hearing", a legal representative will conduct the case on behalf of the school and it is anticipated that hearings will generally take place some weeks after the first mention of a matter with testimony likely to be necessary from a member of the school executive.

### **Satisfactory Resolution of Applications**

The objective in conducting the applications before the Court is to achieve a satisfactory level of school attendance. In cases where this is achieved and school staff are satisfied that a parent will continue to ensure their child's satisfactory school attendance, it is likely that an application will be made by the legal officer to have a CSO placed on the child or a parent for a set period of time, such as 18 months.

As indicated earlier, in cases where the school is concerned to ensure that the gains made through an application are genuine, a Final Compulsory Schooling Order which remains in place for the period that a child remains of school age will be sought as a means of reinforcing with some parents the need to maintain those actions and changes which have brought about the necessary improvement in school attendance.

### **Conclusion**

DET's Legal Unit will be working in conjunction with the non-government schools to ensure that new legislation can be utilised to achieve the desired outcome of ensuring that all children receive the education to which they are entitled.

The Department of Education and Training considers the new legal approaches to dealing with poor school attendance as ground breaking in nature and looks forward to working collaboratively with non-government schools in applying these processes for the educational benefit of children and young people.